

New Hampshire Commission for Human Rights



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Cheryl Hodgdon

v.

Loud Pipes Saloon, Loud Pipes Saloon, Inc.
and Mark Gauthier

ES(P) 6098-97

DECISION OF THE COMMISSION

I. Factual Background

In December 1996, respondent Mark Gauthier bought a building in Somersworth, New Hampshire. At that time, a pub called My Brother's Place was operating in the building, but it subsequently closed on December 29, 1996. Gauthier planned to open his own bar and grill there in the spring of 1997.

The complainant, Cheryl Hodgdon, had worked as a bartender at My Brother's Place from approximately February to October 1994, and again from June to December 1996, when the pub closed. Gauthier and Hodgdon had known one another since the late 1980's, and Gauthier had been a regular patron at My Brother's Place once or twice per week.

In approximately the second week of January 1997, the complainant called Gauthier on the phone and asked about applying for a job at Gauthier's bar, which was to be called Loud Pipes Saloon. Gauthier asked her to submit a job application or resume. Using a job application form which she borrowed from another business, complainant applied for a position as bartender at Loud Pipes Saloon. Her application indicated that she had approximately 20 months experience as a bartender and 10 years experience in food service involving food preparation.

Gauthier called complainant on the phone and confirmed that he had received her application, and on March 21, 1997, complainant met with Gauthier at his building. He showed her work being done on the building, and he talked with her about how many people he was interviewing and how many people he would hire.

On or about April 8, Gauthier called the complainant and asked her

to attend a six hour New Hampshire Liquor Commission seminar in alcohol management on April 10, 1997. According to complainant, during this phone conversation, Gauthier confirmed that he was hiring complainant. Complainant attended the Liquor Commission "TEAM" seminar along with Gauthier, Martin Tatlow, Michelle Bellair, and Maria Fulton, all of whom are listed on the Liquor Commission attendance list as from the licensee "Loud Pipes Saloon." Gauthier bought lunch for complainant and the others attending from Loud Pipes Saloon.

Sometime after that, complainant received a telephone message regarding a staff meeting which was to take place on April 22, 1997, at the Saloon. Present at the meeting were complainant, Gauthier, Tatlow, Bellair, and Fulton. At this meeting, employees, including complainant, were asked to sign various papers relating to employment, including tax withholding forms and affidavits for the Liquor Commission. At lunch, which took place at a restaurant, discussion continued of employees' duties, uniforms, and uniform preferences and sizes. Tatlow, who was then the cook/manager, reviewed shift schedules with everyone.

On the evening of April 22nd, Tatlow came into a hotel where complainant had a part-time job. Complainant informed Tatlow that she would be needing some time off from work in October because she was pregnant and her baby was due then. Tatlow asked complainant if Gauthier knew she was pregnant, and complainant said she had not told him.

A second staff meeting was scheduled for Saturday, April 25, 1997. However, on that day, complainant received two phone messages from Gauthier on her answering machine. The first asked her to call Gauthier at home or at the Saloon. The second stated that he (Gauthier) had reviewed her application and she was no longer needed.

Complainant was distraught at this news and tried to call Gauthier. She was still working at the Eagles Club one night per week, and had intended to continue her shift there after the Saloon opened on May 1. But on April 8, after learning from Gauthier that she had a job with him, complainant had given notice at the hotel.

Complainant gave birth to a daughter on October 8, 1997.

II. Legal Standards

Under RSA 354-A:7, it is an unlawful discriminatory practice for an employer to refuse to hire or employ, or to bar or to discharge from employment, any individual because of the individual's sex. RSA 354-A:7, VI states: "For purposes of this chapter, the word "sex" includes pregnancy and medical conditions which result from pregnancy."

The complainant may prevail in her discriminatory practice claim by proving a violation of law through either direct or circumstantial evidence. Direct evidence of pregnancy discrimination could be any written or verbal statements made by respondent or respondent's agents which on their face demonstrate bias and which are linked to the discriminatory action(s) complained of. It is not limited to evidence from which no inferences need be drawn; rather it is evidence that "relates to action or statements of an employer reflecting a discriminatory . . . attitude correlating to the discrimination . . . complained of." Caban-Wheeler v. Elsea, 904 F.2d 1549, 1555 (11th Cir. 1990).

An unlawful employment practice is established through a showing that discriminatory bias was a motivating factor, even if other factors also motivated the respondent's actions.

Proof of discriminatory motive through direct evidence shifts the burden of persuasion to the respondent, who must then prove that it would have made the same decision absent the discriminatory motive. Smith v. F.W. Morse & Co., 76 F.3d 413 (1st Cir. 1996), [69 FEP Cases 1687, 1691], referring to Price Waterhouse v. Hopkins, 490 U.S. 228, 258 [49 FEP Cases 954] (1989).

If evidence is insufficient to constitute direct evidence of discrimination, the complainant may establish her prima facie case through circumstantial evidence following the burden shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Under this analysis, and on the facts of this case, complainant would have to show:

- (1) That she is a member of a protected category;
- (2) That she applied and was qualified for a job for which respondent was seeking applicants;
- (3) That respondent withdrew his offer of employment to complainant after learning of her pregnancy; while
- (4) Continuing to have the job performed by someone of complainant's qualifications.

The establishment of a prima facie case establishes a presumption of discrimination. The burden then shifts to the respondent to articulate some legitimate, nondiscriminatory reason for his actions. If respondent rebuts complainant's prima facie case, the presumption disappears and complainant must then show that the respondent's reason(s) are a pretext for discrimination.

III. Analysis

As the Court pointed out in its decision in Smith, the "seeming neatness" of the dichotomy between direct and circumstantial

evidence cases is "illusory in certain respects, for evidence rarely comes in tidy, geometrically precise packages. In many cases, the line between McDonnell Douglas, on one hand, and Price Waterhouse, on the other hand, is blurred. In those situations, classification depends on both the quantity and quality of the proof that a court deems sufficient to constitute direct evidence of discriminatory animus." Smith, at 1691.

The direct evidence offered in this case was the testimony of Natalie Talon, a former employee of respondent. Talon, who was hired by Gauthier as a bartender and waitress, testified that on two occasions she heard Gauthier state that he did not want anyone pregnant working in the establishment. On the first occasion she was working and testified she did not remember who Gauthier said this to. On the second occasion, Talon states Gauthier made the remark to her. The remark allegedly was that he didn't want anyone pregnant working in the bar, that it wasn't good for business. Talon was unable to remember when the remarks were made or who was present.

Gauthier denies making the remarks, and, furthermore, testified that he terminated Talon's employment for wrongful conduct and that Talon has been "bad-mouthing" him ever since.

Given the quantity and quality of the direct evidence, the Commission will use the analysis provided in McDonnell Douglas to determine whether complainant has met her burden of proof.

Complainant was a member of a protected category because she was pregnant at the time in question.

The Commission finds, based on the evidence, that complainant applied for a position as bartender and that respondent had such positions open in the spring of 1997, when complainant applied. Respondent admits that complainant met with Gauthier on March 21, that on April 10 complainant attended the TEAM seminar sponsored by the Liquor Commission, and that on April 22 complainant attended a "staff" meeting. Respondent admits hiring Talon and Bellair as bartenders.

Gauthier testified, however, that he did not "recall" an application from complainant, only a "paper" that she sent in long before he was gathering applications and which he lost in a second office he maintained at the time. To the extent that this testimony was meant to convey that Gauthier would only consider hiring individuals who filled out "applications," it was contradicted by evidence that another employee hired, Brenda Breault, did not fill out an application. To the extent that this testimony was meant to convey that Gauthier was not aware that complainant was asking for a job as bartender, it is simply not credible. Complainant's presence in Gauthier's building on March 21, her attendance at the TEAM seminar, and her attendance at the

April 22 staff meeting, are reasonable only if she was an applicant. Moreover, Gauthier's own testimony was that complainant approached him at the Cumberland Farms store in January and asked him for a job, and that his phone message to complainant on April 25 was: "After reviewing the applicants I have decided you're not qualified."

Gauthier stated that if complainant signed an affidavit for the Liquor Commission at the meeting on April 22, as other individuals attending the meeting did, he "scrapped it" because complainant was not an employee.

None of respondent's other witnesses offered any evidence which would show that complainant did not apply for a position as bartender.

The evidence shows that complainant was qualified as a bartender, and had work experience in that position.

The Commission finds that Gauthier did in fact offer complainant a position as bartender sometime prior to April 10, 1997, the date she attended the TEAM seminar, and that Gauthier withdrew his offer of employment on April 25, 1997, in a telephone message left on complainant's answering machine.

Respondent asserts that complainant was never offered a position, and that when Gauthier telephoned complainant on April 25, his recorded message was as noted above, i.e. that complainant was not qualified. The Commission does not give credit to this testimony, however. Complainant alleges that Gauthier's phone message stated that he had reviewed complainant's application and she "was no longer needed." Brenda Breault, a friend of complainant's later hired by respondent, testified that she received a call from complainant on April 25 saying she had been terminated. Breault testified that complainant played Gauthier's phone message for her, and that Gauthier stated that "he didn't need her."

After rejecting complainant, Gauthier had bartending at his pub done by Natalie Talon and Michelle Bellair. Complainant had bartending experience comparable to Bellair's. She had more experience than Talon. After Talon quit in June, respondent hired Brenda Breault.

Respondent Gauthier testified that he did not hire complainant as a bartender at his new establishment because My Brother's Place had had a poor reputation from which he was trying to distance himself. He testified that he patronized the bar once or twice per week and that he was aware of its reputation as a place to buy and do drugs. He testified that he had observed complainant "going out back," when he was a customer of My Brother's Place. He stated that he did not want to hire anyone who had worked at My Brother's Place, and that the "biggest reason" for his decision not to hire

complainant "was the drugs." Gauthier hired Bellair, however, who had also worked at My Brother's Place, and later hired Breault, who had also worked there.

The Commission finds upon all the evidence, that this reason is a pretext for discrimination on the basis of pregnancy. Gauthier had known complainant for years and thus knew all the alleged reasons why he would not hire her for a position in his new bar, long before April 25. The only thing which happened between April 22, when complainant attended a staff meeting, and April 25, when respondent notified complainant that she was not needed, was that respondent became aware of complainant's pregnancy. Secondly, the Commission did not find Gauthier particularly credible, and thus did not credit his argument that he wanted to operate Loud Pipes Saloon on a different footing than My Brother's Place, especially when he hired former staff of My Brother's Place. These facts, plus the evidence of witness Talon that Gauthier stated that he did not want a pregnant bartender, establish the pretextual nature of respondent's defense.

IV. Conclusion

The Commission finds that Loud Pipes Saloon, Inc. and Mark Gauthier discriminated against Cheryl Hodgdon on the basis of pregnancy in violation of RSA 354-A:7,I and VI, by withdrawing an offer of employment after learning of her pregnancy.

The Commission grants complainant's Motion to Clarify respondent and rules that the named respondents in this matter are Loud Pipes Saloon, Inc, and Mark Gauthier, who are jointly and severally liable.

V. Award of Damages

Having determined that respondents have engaged in an unlawful practice, the Commission is authorized to order the respondents to pay damages to the complainant. These damages may include compensatory damages and attorney's fees. RSA 354-A:21,II(d); E.D. Swett, Inc. v. New Hampshire Commission for Human Rights and Leonard Briscoe, 124 N.H. 404 (1983). The Commission is also authorized to order the respondents to pay an administrative fine in order to vindicate the public interest. RSA 354-A:21,II(d).

A. Lost Wages

In determining the back pay award, the Commission calculates the amount the complainant would have earned but for the unlawful discriminatory practice. The Commission subtracts from that amount any unemployment compensation or interim earnings received by the complainant during the time period covered by the award. RSA 354-A:21,II(e).

Complainant's anticipated weekly compensation from respondents was \$198.00 per week, starting May 1, 1997. The number of weeks through the date of hearing (April 19, 1999), taking into account complainant's 12-week maternity leave in the fall of 1997, is 90 weeks. Thus, the amount complainant would have earned but for respondent's discriminatory act, is \$17,820.00.

The Commission finds that complainant mitigated her damages in the amount of \$2,015.00 during the one year period following her termination by Gauthier. However, the Commission does not find, based on her testimony, that complainant made a diligent search for employment during the second year. Complainant should have been able to find comparable work from May 1 1998 through April 1999. Complainant mitigated her damages during this second year in the amount of only \$6,675.00. The Commission finds that this figure should have been at least 50% higher, and therefore will add \$3337.50 to the amount of mitigation.

The total amount of mitigated damages is \$12,027.50 (\$2015.00 + \$6675.00 + \$3337.50). The amount of back pay to which complainant is entitled is \$5792.50 (\$17,820.00 - \$12,027.50).

B. Compensatory Damages

The Commission finds that Cheryl Hodgdon suffered emotional distress as a result of the unlawful discrimination by respondents. She testified that she cried a lot after Gauthier terminated her and had trouble sleeping. Witness Breault also testified that complainant was upset and crying when she learned she had been terminated and that she cried several times after that about the situation. Accordingly the Commission orders the respondents to pay the sum of \$2,000.00 to compensate the complainant for emotional harm.

C. Administrative Fine

In determining whether to levy an administrative fine and what the amount should be, the Commission has considered the following factors: the nature and circumstances of the violation, degree of culpability, any history of prior violations, and the goal of deterrence. The Commission finds that Gauthier's denial that he ever offered complainant a job was false. In order to vindicate the public interest and to deter others, the Commission orders the respondents to pay an administrative fine to the State of New Hampshire in the amount of \$250.00.

D. Attorney's Fees

The commission orders the respondents to pay complainant's reasonable attorney's fees and costs in connection with the bringing of this charge. Complainant's counsel is ordered to submit a detailed, itemized statement of fees and costs within 20

days of receipt of this order. Respondent is granted 10 days from the filing of the statement to object. The Commission will then enter a final order.

E. Total Damages

Respondent is ordered to pay complainant the sum of \$7792.50 with interest plus attorney's fees and costs to compensate her for the financial and emotional harm which resulted from respondents' discrimination. Respondent is ordered to pay \$250.00 to the State of New Hampshire.

So Ordered.

July 16, 1999
Date



Commissioner Richard A. Hesse
Chair for the Hearing Commissioners

Commissioner Loren Jean
Commissioner Maureen R. Manning

RULINGS OF REQUESTS FOR
FINDINGS OF FACT AND RULINGS OF LAW
SUBMITTED BY COMPLAINANT

Proposed findings:

- 1 - 12. Granted
13. Granted, with "on or about Feb. 10, 1997" deleted.
- 14 - 19. Granted
20. Granted
21. Denied
22. Granted
23. Granted
24. Granted
25. Granted
26. Granted
27. Granted
28. Granted
29. Granted, subject to the Commission's finding that this amount should have been larger.
- 30 - 32. Granted
33. Denied
34. Neither granted nor denied as the Commission declines to award front pay.

Proposed rulings:

35. Granted

36. Granted
37. Granted
38. Granted
39. Granted
40. Granted
41. Granted
42. Granted
43. Granted
44. Neither granted nor denied as the Commission declines to award front pay.
45. Neither granted nor denied as the Commission declines to award front pay.
46. Neither granted nor denied as the Commission finds that complainant did not exercise reasonable diligence to mitigate her damages.
47. Granted
48. Granted, that the Commission has such authority.

Respondent did not submit proposed findings and rulings.